Filed 7/29/19 P. v. Pineda CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

OTILIA PINEDA,

Defendant and Appellant.

F074962

(Tulare Super. Ct. No. PCF311100)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Gary M. Johnson, Judge.

Diane Nichols, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, R. Todd Marshall and Matthew A. Kearney, Deputy Attorneys General, for Plaintiff and Respondent.

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BACKGROUND

In an information filed May 27, 2015, the Tulare County District Attorney charged defendant Otilia Pineda with murder (count 1; Pen. Code, § 187, subd. (a)), gross vehicular manslaughter while intoxicated (count 2; Pen. Code, § 191.5, subd. (a)), driving under the influence (DUI) causing injury (count 3; Veh. Code, § 23153, subd. (a)),[1] leaving the scene of an accident (count 4; § 20001, subd. (a)); and misdemeanor driving without a license (count 5; § 12500, subd. (a).)[2] The information alleged an enhancement to count 2 for fleeing the scene of the crime (§ 20001, subd. (c)), as well as enhancements to count 3 for causing great bodily injury (Pen. Code, § 12022.7, subd.(b)), and for a prior conviction of violating section 23152, subdivision (b) (§ 23560).[3]

Defendant moved to exclude evidence of her prior DUI conviction. She contended she had not been advised of – and did not expressly waive – her rights to a jury trial, confrontation and against self-incrimination. The trial court denied the motion.

After trial, a jury convicted defendant on all counts and found all additional allegations true. The court subsequently denied a motion for a new trial filed by defendant.

The court sentenced defendant to three years on count 4 and a consecutive term of 15 years to life on count 1.[4]

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[1] All further statutory references are to the Vehicle Code unless otherwise stated.

[2] Defendant initially raised an issue that the abstract of judgment improperly identified the statutes violated in counts 3 and 4. That abstract was since corrected by the trial court, and the parties agree the issue is now moot.

[3] The information initially alleged a prior conviction, under Penal Code section 191.5, subdivision (d), as to count 2. That allegation was dismissed by the prosecution before trial.

[4] The court sentenced defendant to six years on count 2, plus five years for the fleeing-the-scene enhancement (Veh. Code, § 20001) and two years on count 3, plus five years for the great bodily injury enhancement (Pen. Code, § 12022.7, subd. (b)). The

FACTS

On December 28, 2014, at about 2:30 a.m., CHP Officer Steven Beal was dispatched to a collision on State Route 43 in Tulare County. Officer Beal arrived shortly after 3:00 a.m. Emergency personnel and deputies from the Tulare County Sheriff's Department were already on scene. Beal was "briefed that there was a deceased occupant of one vehicle and the driver of the other vehicle was unaccounted for."

Officer Beal observed an Oldsmobile facing east on the west shoulder, "not too far from the roadway itself." The Oldsmobile had sustained major damage to its driver's side.

Officer Beal also observed a dark green GMC pickup resting on its roof. The GMC was also on the west shoulder facing an easterly direction.

Officer Beal determined that the driver of the GMC had drifted over to the southbound lane and struck the Oldsmobile. Robert Shaw, an accident reconstructionist with the CHP's multidisciplinary accident investigation team, determined the GMC had been traveling at about 63 to 64 miles per hour at the time of the collision. Additionally, the GMC's brakes were not applied in the eight seconds leading up to the collision, and its driver did not let up on the throttle.

A search of the GMC truck yielded a purse with an identification card belonging to defendant. This led Tulare County Sheriff's Deputy Ricardo Alvarez to defendant's house.

A man, who later identified himself as defendant's brother, met Alvarez at the front gate of the home. He claimed defendant was asleep inside. Alvarez asked if the brother could rouse defendant, so they could talk. When defendant came outside, Alvarez observed she had bloodshot eyes, an unsteady gait, slurred speech, and smelled

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court stayed both of these sentences pursuant to section 654. The court did not impose any time on count 5.

of alcohol. Alvarez formed the opinion that defendant was under the influence of alcohol at the time.

Defendant told Alvarez she had been out with friends in Delano. Initially defendant said her truck had been stolen with her purse inside. Later, defendant admitted she had been in a collision and "must have fell [*sic*] asleep and swerved off the roadway." Defendant said she was on her way home when the collision occurred.

After Deputy Alvarez had spoken to defendant, Officer Beal responded to the home. Officer Beal observed defendant's breath smelled like alcohol, her eyes were bloodshot and glassy, and her speech was soft and slurred. She also had an "obvious injury" to the back of her head; a laceration that was bleeding. Beal asked defendant if she had consumed alcohol before driving and defendant said she had one beer. Beal "believe[d]" defendant said she drank between the hours of 8:00 and 9:00 p.m. Defendant was not able to say where she had been drinking.

Officer Beal testified that he asked defendant "if she checked on the other party involved in the other vehicle, she said no, that she was more concerned with finding a phone." Alvarez testified that he asked defendant if she checked on the other driver and defendant replied that she "couldn't get to him."

Defendant said she had waited for several minutes at the scene. She left because she did not have a cell phone, so she "went to get help." However, when asked if she called 911 once she got home, defendant said she said she did not know.

Defendant claimed the tires were "bald or in poor shape, and she referred to the alignment having an issue."[5]

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[5] Shaw, the CHP's accident reconstructionist, testified that defendant's tires were not bald.

However, the vehicle did have an "after-market" suspension and oversized tires. Depending on the "thread pattern" of such a vehicle, the driver might feel the vehicle "want[ing]" to "wander."

Defendant was evasive and seemed displeased with Officer Beal's questions.

Officer Beal administered several field sobriety tests. During a horizontal gaze nystagmus test, defendant's eyes exhibited a "lack of smooth pursuit" and she swayed side to side, which indicated she might be impaired. During a balance test, defendant swayed in a front-to-back motion and had trouble following directions, which are indicators of impairment. Beal attempted to administer a one-leg stand test, which defendant initially attempted prematurely before saying she could not do it because of pain in her legs.[6] Beal attempted to administer a walk and turn test, but again defendant claimed she could not perform the test without risking further pain. Finally, Beal used a preliminary alcohol screening device, which is designed to detect the presence of alcohol in a person's breath. The first sample, given at 4:34 a.m., yielded a reading of 0.071 percent.[7] The second sample, given at 4:49 a.m., yielded a reading of 0.068 percent. From these tests and his other observations of defendant, Beal formed the opinion that defendant was under the influence of alcohol.

At about 6:06 a.m., defendant's blood was drawn. The blood alcohol content of the sample was 0.04 percent. An expert on the effects of alcohol on the body testified for the prosecution. The expert testified that if you know someone's blood alcohol content at a particular time, you can estimate what the blood alcohol content would have been at a prior point in time. Based on a blood alcohol content of 0.04 percent at 6:06 a.m., the blood alcohol content at the time of the collision would have been estimated at between 0.11 and 0.145 percent.[8] According to the expert, it is not safe to operate a motor vehicle at those levels of blood-alcohol.

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[6] Officer Beal was suspicious of defendant's claim of pain.

[7] This test was administered approximately two hours after Officer Beal had been dispatched to the scene.

[8] This calculation used certain rates, like alcohol absorption, that were based on an "average person."

Blood tests of the deceased driver of the other vehicle indicated he had a blood alcohol content of 0.00 percent and tested negative for drugs.

Defendant's Testimony[9]

Defendant testified that she remembered "very little" from the day of the collision. She said she drank "one or two beers" with friends that night. Defendant believes that she fell asleep while driving home.

After the collision, she was confused and did not know what happened. Her head and right leg hurt.[10] She testified, "I started walking toward the other car to see if I could do something but I couldn't." There were no businesses within eyesight, she did not have a cell phone, and she did not see any passing cars. Eventually, she walked home. She does not remember whether she called 911 when she got home.

Defendant said she "possibly" told Alvarez the truck had been stolen, but she could not remember.

Defendant claimed the GMC truck had an alignment problem and would "swerve[]" to the left.[11]

Evidence of Defendant's Prior DUI Conviction

Guilty Plea

The prosecutor admitted documents concerning defendant's guilty plea in her prior DUI case from 2012. On March 5, 2012, defendant had executed an "Advisement of Rights, Waiver, and Plea Form."[12] The form, ostensibly signed by defendant, indicated

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[9] Defendant's testimony concerning the circumstances of her plea in her 2012 DUI case is described in the Discussion section below, in connection with the issue to which is pertains.

[10] Later, her left leg started hurting, as well as her shoulders and back.

[11] Defendant's brother – the registered owner of the vehicle – testified that the truck sometimes pulled to the right.

[12] The circumstances of the plea are discussed in greater detail in the Discussion section of this opinion.

that she was pleading guilty to driving with a blood-alcohol level of 0.08% or higher (§ 23152, subd. (b)) and driving with a suspended license (§ 14601.1).

The form had an admonition entitled "Homicide Admonition – Dangers of Drinking and Driving." The admonition read:

> "I understand that being under the influence of alcohol or drugs, or both, impairs my ability to safely operate a motor vehicle. Therefore, it is extremely dangerous to human life to drive while under the influence of alcohol or drugs, or both.
>
> "If I continue to drive while under the influence of alcohol or drugs, or both, and as a result of my driving, someone is killed, I can be charged with murder. Veh. Code 23593(a)."

Defendant's initials appear next to the admonition.

At trial in the present case, defendant claimed she did not read the admonition before initialing it.

Traffic Alcohol Awareness School of Kern

The Traffic Alcohol Awareness School of Kern (TAASK) has programs to teach people convicted of DUI's about "what can happen[] when you drink and drive" and to have them "change their lifestyle." Defendants convicted of a DUI are mandated to participate in one of TAASK's programs. In group sessions, a TAASK counselor will "go around the room" having participants apply lessons to their lives. The group also "talk[s] about the consequences of drinking and driving if they were to harm or kill themselves or somebody else." The consequence is that the drunk driver can be charged with murder.

TAASK counselor Susan Francis led the group in which defendant participated. Francis's notes reflect that defendant participated in TAASK sessions in 2012, with spotty attendance.

The TAASK notes further reflected the following comments from defendant during her participation in the program. Defendant said alcohol "is not" an issue in her

life; that she is aware of "AA" but has no interest; that she has used alcohol or drugs to relieve sadness; that she drinks daily; that her DUI wreck "wasn't her fault"; that she continues to drink for the "heck of it"; that she "doesn't like taxis so she will probably drive again";[13] and that she understands she could kill someone or herself.

On her last day with the TAASK program, defendant "shared she continues to drink [and] can't say she won't be back." The counselor noted that "[a]t this time [she] is not driving but understands she has a bad habit of drinking & driving." In her exit interview, defendant indicated she now drank once per month.

Defendant testified at trial that she did not pay attention in her TAASK classes.

Ignition Interlock Device

Defendant's brother testified that he allowed defendant to use the GMC truck to go to and from work. He requested that she install a "breathalyzer" on the truck.

The parties stipulated that a portion of a police report could be read into the record. The police report indicated that defendant had an ignition interlock device removed from her brother's truck.

DISCUSSION

I. The Trial Court Did not Err In Refusing to Strike Defendant's Prior DUI Conviction

Procedural Background

After being charged for the present DUI/murder, but before trial on those charges, defendant filed a petition for a writ of habeas corpus in the superior court. The petition sought to invalidate her guilty in plea from the 2012 DUI case on the grounds that her waiver of constitutional rights was not valid pursuant to cases like *Boykin v. Alabama* (1969) 395 U.S. 238 (*Boykin*) and *In re Tahl* (1969) 1 Cal.3d 122 (*Tahl*). The petition

[13] After this note, the counselor wrote, "Aware of future consequences."

had several exhibits, including a declaration from defendant (the "declaration") and transcript of the 2012 arraignment.

The superior court denied the writ petition. Defendant then petitioned this court for a writ of habeas corpus, which we summarily denied before trial on the present charges began.

After the jury trial and conviction, defendant moved for a new trial. Defendant again argued her guilty plea for the 2012 DUI was invalid. The trial court denied the motion.

Arraignment

The transcript of defendant's arraignment on March 5, 2012, began:

"THE COURT: Otilia Pineda.

"THE DEFENDANT: Yes, sir.

"THE COURT: You have a charge of driving with a .08 percent alcohol [*sic*] or above and driving on a suspended driving license. Your test result was .09, a little above the legal limit. [¶] Do you want to plead guilty or speak to an attorney?

"THE DEFENDANT: Plead guilty.

"THE COURT: You will have to fill out a form giving up your rights. Can you read okay?

"THE DEFENDANT: Yes."

Shortly thereafter, defendant was given a form (presumably the plea form discussed below) and told to fill it out. The court called unrelated cases and then recalled defendant's case. The following exchanged ensued:

"THE COURT: Otilia Pineda. Did you understand this form that you filled out giving up your rights?

"THE DEFENDANT: Yes, Your Honor.

"THE COURT: To the charge of driving while having .08 percent alcohol or above, just say the word "guilty."

"THE DEFENDANT: Guilty."[14]

The court proceeded to sentence defendant. Afterwards, the court asked if defendant had any questions, and defendant responded, "No, Your Honor."

Change of Plea Form

That day – apparently during the arraignment hearing described above – defendant executed a change of plea form. Defendant's initials reflected that she understood she was being charged with driving with a blood-alcohol level of 0.08% and driving with a suspended, restricted, or revoked license.

The form contains a section with the heading, "**ADVICE AND WAIVER OF CONSTITUTIONAL RIGHTS**." Under that heading, there are two sections: one that advises defendant of her constitutional rights and another where defendant effects her waiver by initialing next to each of the rights being waived. The advisement of constitutional rights read:

> **"ADVICE OF CONSTITUTIONAL RIGHTS**
>
> **"RIGHT TO AN ATTORNEY:** I understand that I have the right to be represented by an attorney at all stages of this case and that if I cannot afford an attorney, one will be appointed by the Court. At the conclusion of the case there may be a fee for the legal services of any Court appointed attorney reimbursing the County, if you are determined to have the ability to pay at a hearing before the Court. A person may represent himself or herself, but there are dangers and disadvantages in doing so. You will face an attorney representing the People and the Court cannot provide legal advice.

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[14] Defendant says the court effectively "directed" her to plead guilty. It does appear the court's statement could have been worded better. But the written advisements made it crystal clear that pleading guilty was not defendant's only option.

Moreover, the court had earlier *asked* defendant, "Do you want to plead guilty or speak to an attorney?" Defendant responded, "Plead guilty." It was only after that exchange – and the subsequent provision of written advisements – that the court told defendant to "just say the word 'guilty.' "

"**JURY TRIAL:** I understand that I have the right to a speedy and public trial by a jury. At the trial, I would be presumed innocent, and I could not be convicted unless 12 impartial jurors were convinced of my guilt beyond a reasonable doubt."

"**COURT TRIAL:** I understand that if the prosecution agrees, I may have a court trial before a judge instead of a jury.

"**CONFRONTATION AND CROSS-EXAMINATION:** I understand that I have the right to confront and cross-examine the witnesses against me. I understand that I have the right to present and to have the Court issue subpoenas to bring into court all witnesses and evidence favorable to me, at no cost to me.

"**SELF-INCRIMINATION:** I understand that I have the constitutional right to not incriminate myself and that I may remain silent, and that by pleading guilty or no contest I am incriminating myself.

"**PROBATION VIOLATIONS** [¶]: I do not have the right to a jury trial, but I have the right to a hearing before a judge as to whether or not I have violated any condition(s) of my probation."

Immediately following this advisement section, is the waiver section, which read:

"**WAIVER OF CONSTITUTIONAL RIGHTS**

"Understanding all of the above, for all the charges against me, including any prior conviction(s), or probation violation(s):

"29. [Defendant's initials] WAIVER OF ATTORNEY: If applicable, I give up my right to an attorney and wish to represent myself.

"30. [Defendant's initials] JURY TRIAL: I give up this right by pleading guilty or no contest.

"31. [Defendant's initials] COURT TRIAL: I understand that if the prosecution agrees, I may have a court trial instead of a jury and I give up this right by pleading guilty or no contest.

"32. [Defendant's initials] CONFRONTATION, CROSS-EXAMINATION, AND RIGHT TO PRODUCE EVIDENCE: I give up these rights by pleading guilty or no contest.

"33. [Defendant's initials] SELF-INCRIMINATION: I understand that I have the constitutional right to not incriminate myself and that I may

> remain silent, and that by pleading guilty or no contest I am incriminating myself and I give up this right by pleading guilty or no contest."

Earlier in the form, under a heading that said, "*Read Carefully* **PENALTY CHART – CONSEQUENCES OF PLEA/SENTENCE RANGES**," there was a detailed explanation of the possible sentence defendant could receive. Later, the form explained additional actions the Department of Motor Vehicles could take as a result of the conviction. Near the end of the form, defendant initialed a sentence that said: "I have read, considered and understood the above Consequences of Plea and Sentence Ranges chart (pages 2-3) and other consequences contained herein and I am aware of the consequences of my plea."

The form also contained a homicide admonition, which defendant initialed. The admonition read:

> "I understand that being under the influence of alcohol or drugs, or both, impairs my ability to safely operate a motor vehicle. Therefore, it is extremely dangerous to human life to drive while under the influence of alcohol or drugs, or both. If I continue to drive while under the influence of alcohol or drugs, or both, and as a result of my driving, someone is killed, I can be charged with murder. Veh. Code 23593(a)."

Defendant's initials also appeared next to a sentence indicating she was pleading guilty. The word "GUILTY" was circled.[15]

At the end of the form, the judge signed an express finding that defendant "knowingly, intelligently, understandingly, and explicitly waived defendant's rights. The court finds that the defendant's plea and admission are freely and voluntarily made with an understanding of the nature and consequences thereof, and there is a factual basis for the plea…."

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[15] Defendant observes that she did not state her plea to count 3 in open court, and claimed she was not aware her license was suspended. However, the plea form indicated she pled guilty to count 3, and defendant cites no authority that in such circumstances a verbal plea must also be made.

Defendant's Declaration

In her declaration in support of the habeas petition (and subsequent new trial motion), defendant declared that she was not represented by an attorney when entering her guilty plea. She said that the court's on-the-record recitation of her blood-alcohol content led her to "assume[]" she had no chance to fight the case and "had to" plead guilty.

Defendant further claimed she was unaware she could speak to an attorney that day. She "assumed" that by asking whether she wanted to speak to an attorney, the judge was asking if she desired to *hire* an attorney. Since she could not afford one, she thought she had no choice but to plead guilty.

Defendant said she did not understand her plea form and did not speak to anyone about its terms. The court did not advise her that a later DUI could be charged as murder. Nor was she given "a copy of the evidence against me even though the Court and District Attorney had a copy."

Defendant's Testimony in the Present Case

Defendant testified that the judge seemed like he was "just trying to get through" the cases that day. When she was handed the plea form, the bailiff told her to "[j]ust initial the boxes that don't have a line through them." She did not read the form in its entirety. Defendant testified she has difficulty reading the form "now" (meaning at the present trial).

Defendant wanted sentencing to go quickly because the judge "seemed like he was in a hurry trying to get everybody out." Defendant did not ask any questions because "the judge looked mad as it was," and she figured the judge would not answer her questions.

A. Defendant Bore the Burden of Establishing her Prior Plea was Invalid

A guilty plea must be intelligent and voluntary. (*Boykin, supra,* 395 U.S. at p. 242.) A defendant must be advised of, and expressly waive, the rights to self-incrimination, confrontation and jury trial before entering a guilty plea. (*Tahl*, *supra*, 1 Cal.3d at pp. 132–133.)

Challenging the validity of a prior plea on *Boykin-Tahl* grounds "is a collateral attack on a presumptively final conviction." (*People v. Allen* (1999) 21 Cal.4th 424, 435.) Therefore, once the *existence* of the prior conviction has been established, the defendant "bears the burden of proving the constitutional invalidity of the conviction. [Citation.]" (*Ibid.*)

Section 41403 applies when a defendant seeks to have certain judgments of conviction declared invalid on constitutional grounds in a separate proceeding. (§ 41403, subd. (a).) Under that statute, the prosecution must first establish that the defendant actually suffered the conviction. (§ 41403, subd. (b)(1).) The burden then shifts to defendant to show, by a preponderance of the evidence, that his or her constitutional rights were infringed in the separate proceeding at issue. (§ 41403, subd. (b)(2).) If the defendant carries his or her burden, the prosecution may then produce rebuttal evidence. (§ 41403, subd. (b)(3).)

B. Findings of Fact

We note that the superior court, on two separate occasions, found defendant effectively waived her constitutional rights and voluntarily pled guilty. First, the court that accepted defendant's plea in 2012, expressly found defendant "knowingly, intelligently, understandingly and explicitly" waiver her constitutional rights, and made entered her plea "freely and voluntarily." Second, the court in the present case denied defendant's new trial motion after finding she "was properly advised of, and voluntarily waived her rights, and entered into a knowing and voluntary plea."

C. We Reject Defendant's Challenges to the Court's Findings of a Valid Waiver and Plea

Defendant attacks these findings of a valid waiver and plea with several arguments. First, she argues that at the 2012 arraignment, the court "suggested" she was guilty by citing test results indicating she had a blood alcohol content of 0.09 percent, which was " 'a little above the legal limit.' " Defendant claims she took the court's statements to mean that she had " 'no chance' " and " 'had to plead guilty.' " Defendant also cites the court's statement, " 'You will have to fill out a form giving up your rights.' " She takes this statement to mean she "had no choice but to give up those rights." However, the written advisements made absolutely clear that defendant was "presumed innocent"; that she could demand a trial; that she had a right not to incriminate herself; and that by pleading guilty she would be incriminating herself. In other words, the written advisements made clear that defendant did not "have to" plead guilty.

Additionally, we find nothing improper in the fact that defendant's blood-alcohol content test results may have led her to believe she had little or no chance of prevailing at trial. A defendant's evaluation of their chances of prevailing at trial is a common motivation for entering a guilty plea.[16]

Defendant also contends the court "compounded" the issue by then asking if defendant wanted to plead guilty or speak to an attorney. She says the question wrongfully indicated that the two choices were mutually exclusive. But any such confusion was cleared up by the written advisements, which made clear that she had the right to an attorney *and* a right not to incriminate herself by pleading guilty. Moreover, if defendant truly understood the court's statement to mean that she must *either* plead guilty

[16] It might be argued that, with the help of an attorney, defendant could have more thoroughly and accurately evaluated her probability of success. But that is precisely the type of reason the written advisements inform defendants that there are "dangers and disadvantages" to waiving the right to an attorney.

or speak to an attorney (and could not do both), why would she not choose to speak to an attorney?[17] The court's question – if understood to present a binary choice – would have *discouraged* defendant from pleading guilty.

Defendant also argues that the plea form was "eight pages of legalese" – some of which did not apply to defendant's situation – while the advisement of constitutional rights was on the fifth page of the form after four pages of small print. We decline to find her plea invalid on these grounds. The language describing defendant's constitutional rights was straightforward, understandable, and clear. Moreover, defendant expressly told the court she understood the form.[18]

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[17] In her declaration, defendant said she thought the court was asking if she wanted to *hire* an attorney, which she could not afford. But the written advisement made it painstakingly clear that if defendant "cannot afford an attorney, one will be appointed by the Court." Even if she had been initially confused, the written advisement would have cleared up any misunderstanding on the point.

Defendant says the attorney advisement was "technically correct but misleading and confusing." She contends that the language about court-appointed counsel is immediately followed by language suggesting that payment would be expected even if the defendant could not afford an attorney. Not so. The advisement says, "At the conclusion of the case there may be a fee for the legal services of any Court appointed attorney reimbursing the Court, *if you are determined to* ***have*** *the ability to pay* at a hearing before the Court." (Italics and bold print added.)

Defendant says the advisement then "trailed off into vague and dire warnings about the 'dangers and disadvantages' of self-representation without any specifics." Again, not so. The advisement says there are "dangers and disadvantages" in representing oneself. It then identifies a specific danger: "You will face an attorney representing the People and the Court cannot provide legal advice."

[18] Defendant says the court asked the "useless" question of whether she understood the form. She argues that she could not know whether she understood the form without the assistance of an attorney. We disagree. The written advisement clearly spelled out her right to an attorney in understandable language. We decline to adopt the ironic holding that a waiver of the right to counsel can only be effective after advice from counsel.

Finally, the court was free to reject some or all of defendant's statements in her declaration, even if uncontradicted. (See *People v. Tannehill* (1961) 193 Cal.App.2d 701, 705 [court "not required" to accept even uncontradicted testimony of defendant in support of a motion because such evidence must be weighed against "strong presumption" that judgments are valid].) The court could have reasonably found defendant lacked credibility and therefore failed to show her prior plea was unconstitutionally invalid.

II. Defendant's Conviction on Count 3 Must be Vacated

The parties agree that count 3 (driving under the influence causing bodily injury; § 23153, subd. (a)) is a lesser included offense of count 2 (gross vehicular manslaughter while driving under the influence; Pen. Code, § 191.5, subd. (a).) As a result, the conviction on count 3 must be vacated. We accept the concession and will vacate the conviction on count 3 and the true findings on its enhancements.[19] (See *People v. Miranda* (1994) 21 Cal.App.4th 1464, 1468.)

III. Instruction on Enhancement to Count 2

Defendant next contends that the court erred in instructing the jury on the "fleeing the scene" enhancement to count 2. (§ 20001, subd. (c).)

The sentence on a conviction for gross vehicular manslaughter while intoxicated[20] is subject to enhancement if the trier of fact finds the defendant fled the scene of the crime after committing the manslaughter. (§ 20001, subd. (c).)

The conduct proscribed by the enhancement is " 'fleeing the scene of the crime.' " (*People v. Vela* (2012) 205 Cal.App.4th 942, 950.) Yet, a prior version of the pattern jury

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[19] Defendant also argued, "in the alternative," that there was insufficient evidence to support one of the enhancements to count 3. Because defendant only asserted this argument on the condition we did not strike count 3, we do not address it.

[20] The enhancement may also be applied to vehicular manslaughter under Penal Code section 192, subdivision (c)(1). (§ 20001, subd. (c).)

instruction for the enhancement incorrectly identified the actus reus of the enhancement as " 'willfully fail[ing] to immediately stop at the scene of the accident.' "[21] (*Ibid*., fn. omitted.) Because failing to stop is *not* the actus reus of the enhancement, the prior pattern instruction was "legally inaccurate." (*Ibid*.) Accordingly, an appellate decision rendered in 2012 recommended that the jury instruction be modified "by deleting the reference to failing to immediately stop at the scene and substituting the actus reus element intended by the Legislature – fleeing the scene." (*Id.* p. 951, fn. 7.) The present version of the instruction now correctly identifies the actus reus of the enhancement as: "The defendant willfully fled the scene of the accident." (See CALCRIM No. 2160.)

Here, however, the court instructed the jury with the old instruction and identified the actus reus of the enhancement as "fail[ing] to stop immediately at the scene of the accident." The court further instructed the jury that "[t]he duty to stop immediately means that the driver must stop his her [*sic*] vehicle as soon as reasonably possible under the circumstances."

The Attorney General concedes the instruction was erroneous, but argues the error was harmless beyond a reasonable doubt. The Attorney General's sole argument on this point is that the evidence defendant fled the scene was overwhelming.[22]

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[21] A different subdivision of Vehicle Code section 20001 (i.e., subd. (a)) establishes a different, stand-alone crime: failing to stop at the scene of an accident and provide certain information to an officer. (§ 20001, subd. (a).) The actus reus of that crime *is* failing to stop at the scene. But the *enhancement* described in subdivision (c) clearly identifies a different actus reus: fleeing the scene of the accident. Therefore, while the instruction given here was appropriate for the subdivision (a), substantive stand-alone crime, it was improper to give for the subdivision (c) enhancement.

[22] The Attorney General does not rely on the fact that the prosecutor correctly described the two elements of the enhancement during closing as: "that the defendant knew that she had been involved in an accident that injured another person and *that she fled the scene*." (Italics added.) Presumably, this is because the court instructed the jury to follow its own instructions to the extent they conflict with the attorneys' comments. Thus, this was not a case where the prosecutor supplied an element that was simply missing from the court's instruction. Rather, the prosecutor and court supplied two

A. Instructional Error was not Harmless Beyond a Reasonable Doubt

Failing to instruct the jury on an element of a charged offense is a "very serious constitutional error because it threatens the right to a jury trial that both the United States and California Constitutions guarantee. [Citations.]" (*People v. Merritt* (2017) 2 Cal.5th 819, 824.) Such error is deemed harmless only if "it is clear beyond a reasonable doubt that a rational jury would have rendered the same verdict absent the error." (*Id.* at p. 831.)

" '[W]here a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless.' [Citation.]" (*People v. Merritt, supra*, 2 Cal.5th at p. 832, quoting *Neder v. United States* (1999) 527 U.S. 1, 17.) However, in this case, we cannot say the "fleeing" element was uncontested or supported by overwhelming evidence in this case.

As the Attorney General admits, there was evidence that after the collision, defendant stopped and tried to reach the victim, but could not. Defendant testified that because she could not get to the other driver, and did not have a cell phone, she left to get help. Defendant claimed she had waited for several minutes at the scene. The Attorney General concedes defendant leaving the scene under such circumstances was "possibly understandable" because she did not have a cell phone.

These factors show the evidence of fleeing was not overwhelming. If this version of events is accepted, defendant did not "flee" the scene but instead attempted to reach the victim. Defendant claimed she was unable to do so. She further claimed she could not call for aid from the scene because she did not have a cell phone, so she left to get help.

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different actus reus elements for the enhancement. Under the court's instructions, the jury was required to use the court's incorrect instruction rather than the prosecutor's correct description.

The Attorney General points to evidence of several incriminating facts that arose later: Defendant was asleep at home when Deputy Alvarez arrived, and she initially claimed the truck had been stolen. Certainly, this is blameworthy, deceptive behavior. But we cannot say it is "overwhelming" evidence she had previously "fled the scene" as required to impose the enhancement.

On one hand, defendant's testimony was self-serving and arguably inconsistent with her later attempts to hide her involvement. On the other hand, the testimony was plausible and was not directly contradicted. Therefore, we cannot say that we are certain *beyond a reasonable doubt* that *no rational jury* would *ever* credit the testimony.

As a result, we will strike the "fleeing the scene" enhancement to count 2 under section 20001, subdivision (c). The prosecution may retry the enhancement on remand.

DISPOSITION

The true finding on the fleeing the scene enhancement (§ 20001, subd. (c)) to count 2 is stricken. The prosecution may elect to retry the enhancement within 60 days of the issuance of the remittitur.

The conviction on count 3 is reversed, and the enhancements to count 3 are stricken.

In all other respects, the judgment is affirmed.

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POOCHIGIAN, Acting P.J.

WE CONCUR:

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DETJEN, J.

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SMITH, J.